

REMARKS

Claims 25-28 and 37-58 were considered by the Examiner. Claims 25-28, 37-56, and 58 were allowed. The claims were subjected to a restriction requirement and claim 57 was withdrawn from consideration by the Examiner as allegedly being directed to a non-elected invention. Applicant traverses the restriction requirement and withdrawal. In this response, no claims have been amended, cancelled, or added. Therefore, claims 25-28 and 37-58 are still under consideration.

In the Office Action, the Examiner states that claim 57 is independent or distinct from the invention originally claimed. It is the Examiner's position that claim 57 presented a species different from those previously considered. It is also the Examiner's position that the originally presented invention has received an action on the merits and has, therefore, been constructively elected by original presentation for prosecution on the merits. Accordingly, the Examiner withdrew claim 57 from consideration as being directed to a non-elected invention. For the reasons that follow, Applicant respectfully traverses the restriction requirement and the Examiner's withdrawal of claim 57, and requests reinstatement of claim 57.

Under MPEP 803, there are two criteria for a proper requirement for restriction: (1) the inventions must be independent or distinct and (2) there must be a serious burden on the Examiner to examine all the inventions. Also according to MPEP 803, a serious burden on the Examiner may be *prima facie* shown if the Examiner shows by appropriate explanation of separate classification, or separate status in the art, or a different field of search for the inventions as defined in MPEP 808.02. Applicant respectfully submits that the Office Action fails to demonstrate a serious burden on the Examiner.

Additionally, Applicant submits that claim 57 merely relates to another embodiment of the present invention and is not independent or distinct from the invention previously claimed. Independent claims 25, 27, 37, and 58, which are allowed, recite the following features (where, as explained below, feature (b) is different in claims 27 and 58):

(a) "an n-th nitride semiconductor crystal layer grown on or above the lower substrate via the n-th mask" and

(b) "the (n+1)-th patterned mask containing a material having a growth suppressing material substantially provided above an opening of the n-th patterned mask".

(Feature (b) in claims 27 and 58 is different from the above feature (b). In claims 27 and 58, feature (b) reads "the (n+1)-th patterned mask containing a material having a growth suppressing effect provided so as to be at an angle of about 90° or 120° relative to the n-th patterned mask" and "the (n+1)-th patterned mask containing a material having a growth suppressing effect, provided so as to be at an angle of about 90° or more relative to the n-th patterned mask", respectively.)

Claim 57 similarly recites the above features (a) and (b). Features (a) and (b) are structural features of the present invention which were used to distinguish the present invention over the cited references. Please see the Response to the Office Action of December 17, 2002. Accordingly, claim 57 is distinguished over the cited references for at least some of the same reasons as allowed independent claims 25, 27, 37, and 58. As such, independent claim 57 is merely directed to a different embodiment of the same invention.

Accordingly, Applicant respectfully submits that the restriction requirement is not proper and requests withdrawal thereof.

Summary of the Telephone Interview of May 21, 2003 Between the Examiner and the Undersigned

On May 21, 2003, the Examiner conducted a telephone interview with the undersigned. During the interview, the Examiner indicated that he would impose a restriction requirement because, in his view, claim 57 is directed to a distinct or independent invention from the previously claimed invention. Applicant requested that the Examiner issue a written Office Action setting forth the Examiner's position.

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CONCLUSION

In view of the foregoing, Applicant respectfully submits that all the pending claims patentably define the subject invention over the cited prior art. Accordingly, Applicant respectfully requests allowance of the pending claims at the earliest possible date.

In the unlikely event that the transmittal letter is separated from this document and the Patent Office determines that an extension and/or other relief is required, Applicant petitions for any required relief including extensions of time and authorizes the Commissioner to charge the cost of such petitions and/or other fees due in connection with the filing of this document to

Deposit Account No. 03-1952 referencing docket no. 299002048410.

Respectfully submitted, 

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By: Ararat Kapouytian
Registration No. 40,044Morrison & Foerster LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: (415) 268-7000
Facsimile: (415) 268-7522